IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. and MGONYA, J.A.)

CIVIL APPLICATION NO. 384/02 OF 2022

PASCHAL BANDIHO ..... APPLICANT

VERSUS

ARUSHA URBAN WATER SUPPLY & SEWERAGE AUTHORITY (AUWSA) ..... RESPONDENT

(Application for Review of the Judgment of the Court of Appeal, at Arusha)

(Mugasha, Sehel and Kairo, JJ.A.)

dated the 21st day of February, 2022
in
Civil Appeal No. 4 of 2020

.....

RULING OF THE COURT

6th & 14th November, 2023

MWAMBEGELE, J.A.:

The applicant, Paschal Bandiho, was employed by the respondent, Arusha Urban Water Supply & Sewerage Authority (AUWSA), until 28th August, 2012 when his employment was terminated for misconduct/gross dishonesty. He complained to the Commission for Mediation and Arbitration (CMA) but its decision did not amuse him. His complaint to the High Court by way of revision was also barren of fruit. So was his appeal to this Court. Undaunted, he has come to this Court on review by a notice of motion

predicated under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Laws of Tanzania as well as rule 66 (1) (a), (c) and (e) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion is predicated on three grounds on which the applicant seeks review of our decision. These are:

1. The decision of the Court was based on a manifest error on the face of the record resulting in miscarriage of justice;
2. The Court's decision is a nullity; and
3. The judgment was procured illegally or by fraud or perjury.

The application is supported by an affidavit deposed by the applicant himself. The respondent filed no affidavit in reply to oppose the application.

When the application was called on for hearing before us, the applicant appeared in person, unrepresented. The respondent appeared through Mr. Francis Rogers, learned Principal State Attorney and Mr. Thomas Mahushi, learned State Attorney. When we called the applicant to address us on his application, fending for himself, he did no more than adopt the written submissions he earlier filed on 8th June, 2022 as part of his oral arguments. He implored us to allow the application.

In his written submissions, the applicant challenges how the proceedings of the Disciplinary Committee were conducted submitting that it was not chaired by a sufficiently senior management representative who was not involved in the circumstances giving rise to the case. This, he submitted, offended rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules - GN No. 42 of 2007. The applicant also submits that he was charged by an improper disciplinary authority; the Management Disciplinary Committee, he should have been charged by the Board of Directors Disciplinary Authority. This was contrary to regulation 7.2.1.1 of the AUWSA Staff Regulations of 2006, he argued. He contends that this is a jurisdictional error and for that reason, the Court made a decision which is a nullity.

The applicant goes on to submit that the CMA and the High Court took a view which was contrary to the rule laid down under the Employment and Labour Relations (Forms) Rules – GN No. 65 of 2007 arguing that this is an error apparent on the face of the record. By agreeing with the CMA and the High Court that the termination of employment of the appellant was substantively fair and that the requisite procedure was complied with save for some minor infraction of lack of proof of service of minutes of the

meeting on the appellant, he argued, the Court made an error apparent on the face of the record.

The appellant goes on to submit that the decision of the Highest Court of the land was against the evidence; that it believed the evidence of defence witnesses which did not depict the truth. That was contrary to the provisions of section 162 of the Evidence Act, 1967, he argued. The applicant submits further that the Court be pleased to review its judgment and affirm that it was pronounced illegally without considering rules 113 (d), 94 (1) (2) (3), 100 (1) & (2) of the Tanzania Court of Appeal Rules. In support of his arguments, he cited **Abdallah Hamisi Salim @ Simba v. Republic**, Criminal Appeal No. 68 of 2008 (unreported) wherein it was held that review would be granted where there is a manifest error on the face of the record which resulted in miscarriage of justice; or where the decision was obtained by fraud; or where a party was deprived of the opportunity to be heard.

Mr. Rogers, given that he did not file an affidavit in reply, had some limitations in response to the applicant's submissions. He had to respond to legal matters only. In the circumstances, he responded that the applicant prays to have the decisions of the CMA and High Court reviewed which is

not within the jurisdiction of the Court. To buttress this proposition, he cited to us **Isaya Linus Chengula v. Frank Nyika** (Civil Application No. 487 of 2020) [2022] TZCA 167 (31 March, 2022) TANZLII wherein, relying on **Attorney General v. Mwahezi Mohamed & Others** (Civil Appeal No. 314 of 2020) [2020] TZCA 1828 (22 October, 2020) TANZLII, we held that the record under reference in rule 66 of the Rules is the judgment or order of the Court. The learned Principal State Attorney thus beseeched us to dismiss the application.

Having recapitulated the applicant's written submissions and the respondent's rebuttal with regard to the legal point, we should now be in a position to determine the application. We have deliberately reproduced the relevant parts of the applicant's arguments in the written submissions with a view to seeing whether they are fit in an application for review. Admittedly, a big chunk of the complaints in the written submissions seek to challenge the procedure in the CMA and the High Court. As rightly put by the learned Principal State Attorney, that does not fall within the scope and purview of our jurisdiction in review. At this juncture, we cannot resist the urge of reproducing an extract, as we did in **Isaya Linus Chengula** (supra), in **Mwahezi Mohamed** (supra):

*"Rule 66(1) of the Rules is very clear that, the Court may review its "**judgment**" or "**order**", which means, for the Court to determine an application for review, all it needs to have before it is the impugned decision and not the evidence adduced during trial or decisions of subordinate court(s) .... We need to emphasize here that, the record referred in review is either the "**judgment**" or "**order**" subject of review."*

Given the position we took in the **Isaya Linus Chengula** (supra) **Mwahezi Mohamed** (supra), the applicant's complaint on what transpired in the CMA and the High Court and his invitation to us to rectify the same, is misplaced. Likewise, his complaint on the analysis of evidence of the impugned decision of the Court, is misplaced. If anything, the applicant wants us to sit on our own appeal. This is unacceptable. As we held in the oft-cited **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218:

"... a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

We also observed:

> *"... no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no, judgment can be, beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review."*

In the matter before us, what is evident in the applicant's affidavit and written submissions is his dissatisfaction against the decision of the CMA all through to the High Court and Court of Appeal. We have failed to see any manifest error apparent on the face of the record that would justify a review. Neither have we seen any illegality in our judgment that would suggest that it is a nullity. As bad luck would have it, the applicant has also not shown any scintilla of evidence suggesting that our judgment was procured illegally or by fraud or perjury as claimed in the notice of motion. What he has made is a sheer allegation in the notice of motion. No iota of it appears in the written submissions.

In the upshot, we are satisfied that the applicant has not succeeded in substantiating that our decision complained of was marred with any

manifest error on the face of the record. Neither has he succeeded in showing that it is a nullity, let alone showing that it was procured by fraud or perjury. This application is seriously wanting in merit. We dismiss it. As the application stems from a labour dispute, we make no order as to costs.

DATED at **ARUSHA** this 13th day of November, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered on this 14th day of November, 2023 in the presence of the applicant in person, unrepresented and Mr. Leyani Mbise, learned State Attorney for the respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL